

UESC CONTRACTING OFFICER ISSUES ROUND-UP

FOR THE SPECIAL SESSION: ENERGY LAWYERS AND CONTRACTING OFFICERS
WORKSHOP, FEDERAL UTILITY PARTNERSHIP WORKING GROUP MEETING

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UESC PROCESSES – CONTRACTING OFFICER LINGERING QUESTIONS

- With so much legislation surrounding the requirement for the reduction of energy in Federal facilities, and the authorization for entering into contracts with servicing Utility companies, why is there still confusion about the details in the acquisition processes?

REASONS FOR CONFUSION

- There is no Federal Acquisition Regulation (FAR) Part that outlines the processes, procedures, and pertinent clauses applicable to this “hybrid” form of contracting.
- FAR Part 41 is the overarching policies and procedures, but does not contain detailed guidance for the contracting officer for energy management services.
- FEMP has developed comprehensive Enabling Documents to assist contracting officers and agencies find answers and solutions to the acquisition processes.

- Acquisition and Legal opinions within Agencies sometimes differ with regard to the specific Agency procedures.
- FEMP is committed to work with Agencies to understand their internal processes and continue to assist contracting officers.

THE DEVIL IS IN THE DETAILS

- The GSA Areawide Contract includes energy management services so that Ordering Offices can use this streamlined vehicle to place UESCs with their regulated Utility companies.
- But these instruments often stop short of providing the details in the processes that concern the Contracting Officer.

- The day to day questions in developing the UESC and application of appropriation and contracting regulations can be daunting.
- The level of detail and internal training provided by some Agencies does not yet address the concerns of the Contracting Officer.

A Sampling of Questions

**THE FOLLOWING SLIDES ILLUSTRATE SOME OF THE QUESTIONS THAT
CONTINUE TO ARISE FROM THE ACQUISITION COMMUNITY AS
NEWCOMERS EXPLORE MEETING ENERGY GOALS
THROUGH UESC METHODS**

- How can rebates be accepted? Does a check from the Utility have to be issued to the US Treasury—thereby eliminating the installation where the work is performed from reaping the benefit of the rebate?
- Can the rebate be taken at the time of Task Order award by a deduction to the cost of the Task Order?

- What is the Government position on requiring the Utility to perform work for the removal of hazardous materials (asbestos/lead paint) when encountered in performance of the UESC?
- Do these costs have to be factored into the total cost of the project (LCCA) if this is an unforeseen condition?

- Should the Service Contract Act apply to the post-award requirement to provide Performance Assurance analysis and reports?
- Why is a Justification for Other Than Full and Open Competition required when legislation authorizes the direct award to a serving Utility?

- At what point does a Design need to be paid for to avoid violation of the Anti-Deficiency Act?
- If the cost of the Design provided in FY12 is planned to be rolled into the cost of the project, but the project is cancelled in FY 13, what year's appropriation should be used for payment? Has there been a violation of the Anti-Deficiency Act?

THE BUY AMERICAN ACT

The Buy American Act is a riddle,
wrapped in a mystery inside an enigma.

(With apologies to Sir Winston Churchill)

BUY AMERICAN ACT

- There is no indication in FAR Part 41 for the acquisition of Utility services that the Buy American Act applies.
- Yet, it is commonly recognized that the installation of equipment to produce the energy savings required is accomplished by companies and tradesmen who perform construction activities as described in FAR Part 36.

- The conclusion has been to include the Buy American Act and corresponding clauses in the Task Order.
- Should the Contracting Officer require the Utility to identify non-compliant equipment with its submission of the Investment Grade Audit?

- If foreign equipment is identified at this stage, the Contracting Officer can begin the process to obtain a waiver due to non-availability or unreasonable cost before award of the Task Order.
- This will mitigate delays to the schedule and anticipated start of payment to the Lender.

Challenges to Utility Companies

- Many Utility Companies use ESCOs who are Large Business concerns.
- What steps are being taken to bring in Small Business concerns from the Local Area who are qualified to perform these services?
- Small Businesses typically have lower overhead rates, are committed to the local community, and have a stake in providing exceptional service.

GOOD NEWS

- The first Advanced UESC Workshop is being held here this Thursday and Friday (Oct 18-19) after the FUPWG concludes. This workshop is designed to be more in-depth for the contracting officer.
- The next Advanced UESC Workshop is scheduled for Nov 1 – 2 in Washington, DC at Edison Electric. Contact FEMP to sign up for the Workshop.